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VINCENT J. MARELLA

September 29, 1994

By Fax - 202/514-9368

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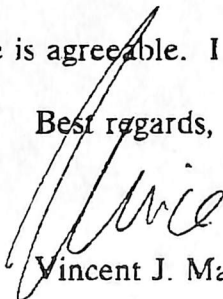
Dear Merrick:

I believe Nancy Luque spoke to you about making a presentation on the new DOJ Advisory Board on Professional Responsibility at the upcoming ABA White Collar Crime Committee meeting on October 15 in Washington, D.C.

As you know, we usually have a presentation on a topic of interest at the conclusion of the regular agenda. The presentations generally last about 45 minutes, including a question and answer period. We feel that the Advisory Board would be a good topic and hope that you will be available to make the presentation. If David Margolis is able to attend, we would be more than happy to have a joint presentation on this topic.

Please let me know if the above is agreeable. I look forward to hearing from you.

Best regards,



Vincent J. Marella

VJM/jp
A:Garland.L



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September 19, 1994

TO: White Collar Crime Committee Members
FROM: Vincent Marella, Committee Chairperson
SUBJ: OCTOBER 15 COMMITTEE MEETING

As the new Chairperson of the White Collar Crime Committee, I would like to invite you to attend the next Committee meeting to be held on:

Saturday, October 15, 1994
10:30 - 1:00 p.m.
Law Offices of Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, DC

The Committee Vice Chairs and I hope that you will be able to come to the meeting and participate in Committee activities. We are interested in your views on issues facing the white collar bar and your ideas as to how the Committee can and should respond to these issues.

Please return the enclosed R.S.V.P. slip to Mable Muldrow in the staff office as to whether or not you will be attending the meeting for security purposes and breakfast count.

Enclosed is a brochure and registration form for the:

1994 ABA/ABA Money Laundering Enforcement Seminar
October 27-28, 1994
Stouffer Mayflower Hotel
Washington, DC

Also, enclosed is a discount air travel flyer to be used when making airline reservations to attend an ABA meeting.

We look forward to seeing you at the meeting.

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April 26, 1994

Mr. Merrick Garland
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Dear Mr. Garland:

As Chairperson of the Criminal Justice Section, I am pleased to appoint you to the White Collar Crime Committee for the 1993-94 Association year.

Your Committee Chairperson Reid Weingarten will be in touch with you concerning Committee work and meeting plans for the year. Questions or suggestions concerning Committee activities should be directed to your Committee Chair.

Thank you for your willingness to contribute to the Committee's work and to the Section's efforts. I have been asked to advise you (because of Federal legislation) that the value of volunteer services to the American Bar Association and ABA Sections, Divisions and Committees is not deductible as a charitable contribution for Federal income tax purposes.

Enclosed is a copy of the Committee's membership roster. If your listing on the roster is incorrect, please contact Mable Muldrow in the Section's staff office by May 13.

Enclosure

Sincerely yours,

Randolph N. Stone
Chairperson

cc: Reid Weingarten, Committee Chairperson
Mable L. Muldrow, Staff Liaison

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05/09/94

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April 25, 1994

TO: WHITE COLLAR CRIME COMMITTEE MEMBERS
FROM: Reid Weingarten, Chairperson
SUBJ: MAY 21 MEETING

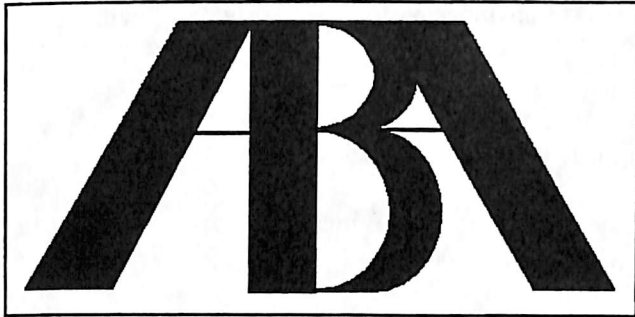
The White Collar Crime Committee will hold its next meeting on:

Saturday, May 21, 1994
10:30 - 12:30 p.m.
Steptoe & Johnson
Concourse Conference Room
1330 Connecticut Avenue, N.W.
Washington, DC

The March 19 meeting summary is enclosed. Please fax or mail the enclosed R.S.V.P. slip to Mable Muldrow in the staff office to let us know whether or not you will be attending.

Enclosed are order forms for course materials from the 1994 WCC National Institute held March 3-4, 1994 in New Orleans and the Health Care Fraud seminar held February 11-12, 1994 in Phoenix, AZ. Additional enclosures include the WCC Newsletter, ("Beat the Rap" Sheet) and the Bank Fraud Newsletter.

I hope to see you on May 21 !



WHITE COLLAR CRIME COMMITTEE

THE AMERICAN BAR ASSOCIATION
Criminal Justice Section
1800 M Street, NW
Washington, DC 20036

TO: WHITE COLLAR CRIME COMMITTEE

FROM: Kenneth Goldsmith, Staff Counsel

RE: SUMMARY OF MARCH 19 MEETING

The White Collar Crime Committee, chaired by Reid Weingarten, met in Washington DC at Steptoe & Johnson on March 19, 1994. A list of those people who recorded their attendance is attached. However, it is apparent that more members were in attendance than those who actually recorded their presence.

1. REMARKS OF THE CHAIR: Reid Weingarten welcomed members to the meeting. He explained that there would not be a guest speaker at the meeting in response to concerns that the Committee attempts to handle too much material at each meeting. Since there were two items up for debate and committee vote, he did not arrange for a speaker.

Reid announced that Ethiopia is currently seeking experienced lawyers to assist in its work regarding abuses of the military, etc., and will pay for the attorneys' airfare and hotel accommodations for a two week period. Interested persons should contact Reid. 202/429-3000.

It was also announced that the vice-chairs will now be given responsibility of a regional subcommittee in an effort to balance out the vice-chairs' responsibilities. The assignments given were as follows: John Carroll -- Louisiana; James Cole -- Florida; Darryl Jackson -- Atlanta; Mike Pasano -- Illinois; and Amy Rudnick -- Texas.

The next Committee meeting will be on Saturday, May 21 at Steptoe & Johnson in Washington, DC

at 10:30 a.m.

2. REGIONAL SUBCOMMITTEE REPORTS:

- ▶ FLORIDA -- Mike Pasano was not present, but Reid explained that there is a push regarding the IRS Form 8300 compliance cases (reporting identity of client when payment of fee made in cash over \$10,000)
- ▶ ILLINOIS -- Jeff Stone was not present but Reid announced that they would be holding a meeting on April 12. U.S. Attorney, Chicago, is expected to speak.
- ▶ CALIFORNIA, Los Angeles -- Vince Marella; They held an Ethics Seminar on January 11 which was well attended and also featured a U.S. Attorney
- ▶ GEORGIA, Atlanta -- Joe Whitley, the new Regional Subcommittee Chair, reported that there was a meeting on February 17, from which a newsletter should be printed by May 1. It was very successful, with attendance from NC, SC, MS, AL, FL, et al.

3. SUBCOMMITTEE REPORTS:

The success of National Institute in New Orleans was briefly discussed. It was understood by one member to have been attended by 230+ people

- ▶ HEALTH CARE FRAUD -- The Committee held its second annual program on February 11&12. Over 200 attended including the panelists, and roughly one-third were from the government. Of particular note, the course materials were excellent. They presented Criminal Law to those in the Health Care field, and Health Care to those in the Criminal Law field. Because of the great flux of Health Care legislation, a task force has been created to track and monitor the new bills. The new legislation focuses primarily on new remedies for cases involving fraud or abuse, and they also outline new offenses. It was reported that a representative from the FBI provided the statistic, after the program, that there were over 1,000 active cases on Health Care, although the Committee remarked that there seems to be few indictments thus far.
- ▶ MONEY LAUNDERING -- The Bryan Bill passed and the Gonzalez Bill is expected to pass. Ratzlaf requires the new standard that a defendant needs to know that his or her activity is illegal. The case will almost assuredly be legislatively overturned.

There is concern over the Sentencing Commission's ability to enact the proposed guidelines for money laundering. Of the five Commissioners, two of their terms have expired and sit part-time. However, at least four Commissioners are needed to vote on proposed guidelines, and while the Commission holds that its current Commissioners have the authority to pass the proposed guidelines, there are those who question their authority to do so. The subcommittee will be holding a program on, tentatively, October 27 & 28 at the Mayflower Hotel in Washington, DC.

- ▶ CORPORATE CRIMINAL LIABILITY -- Milton Eisenberg reported that the subcommittee is currently wrapped up in the beginnings of a project and did not have a report, as yet. He did, however, present an outside report on the new Sentencing Guidelines as have been applied against "Business Crimes." He cited that there have been 26 cases thus far under the guidelines. There was disclaimer that "no inferences should be drawn from such a small

sample." However, Milton then cited the following from the article: 17 of 26 of the cases involved a fine of \$5,000 or less; 24 of 26 involved privately-owned corporations -- only two were publicly traded. Larry Urgenson will do a summary for the next newsletter. Other hot topics in the area are successor criminal liability and Qui Tam issues.

► **ANTITRUST** -- The Committee newsletter provided a summary of two cases which are of current concern to antitrust law. To summarize, one case involves the issue of "good faith" when attempting to indict someone for the purpose of making a statement regarding enforcement when the government may have known that at least three of the defendants were beyond the jurisdiction of the government all along.

► **TAX ENFORCEMENT** -- Relevant news in the tax area included the appointment by Assistant Attorney General - Tax, Loretta Argrett of Mark Matthews to Deputy Assistant Attorney General, Tax Division. Subcommittee Chair Justin Thornton reported that Matthews comes from the Southern District of New York and has had past Treasury experience and a strong background in money laundering.

Special recognition was also given to Committee member Jill Shellow for her recent appointment as assistant/advisor to Loretta Argrett on Criminal Tax Matters.

Justin also reported that the Tax Amnesty Program extended to attorneys was so successful in the number of attorneys who came forward to pay taxes past due, that the government may now be checking into lawyers' tax forms much more closely.

► **BANK / SAVINGS & LOAN FRAUD** -- Subcommittee Chair, Stephen Learned directed members to the WCCC newsletter for a recent advancement in the fraud area. The newsletter had not been dispersed to the committee prior to the meeting. The recent development is that Hammerschmidt §371 conspiracies to defraud the U.S. have been narrowed to only those schemes actually intending to defraud the government. The case is United States v. Licciardi, No. 92-10046, 1994 U.S. App. LEXIS 332 (9th Cir. Jan 11, 1994).

► **PUBLIC CORRUPTION** -- Subcommittee Chair, Jim Cole reported that Lee Rodick has been named the new Chief of Public Integrity, which he feels is positive. He also reported that there was a recent 11th Circuit reversal in the Martinez case which requires that there be a specific quid pro quo in campaign contributions.

It was also noted that Subcommittee Chairs, Jim Cole and Bob Hauberg, are planning a Public Corruption Seminar.

► **FEDERAL CRIMINAL RULES** -- Abbe Lowell brought a proposed change to Rule 9 to the Committee for a required second vote. The proposed change would change the language of the rule to replace "summons" for "warrant, placing the presumption that a summons would be preferred over a warrant, and introducing language requiring there to be a prosecutorial showing of "good cause" for a warrant to issue. Though abuse of the rule appeared to be jurisdictionally sporadic, actual instances of abuse (Wall Street scenario) and future potential were sufficient for the proposal to pass 11-2 in the subcommittee. After clarification and defining language was added to the proposal at the meeting, the Committee passed the proposal 28-11.

► **ETHICS** -- Subcommittee Chair, Sheldon Krantz, introduced a proposal regarding

Congressional oversight of government prosecutors, in specific, Congress's ability to require the production of the Department of Justice's or line attorney's work product in the assessment of a case, etc. The proposal would make clear the ABA is against such "inquiries." The proposal was passed, unanimously.

Members of the Committee were invited to meetings with the Department of Justice to focus on and discuss ethical issues involving the prosecutors and defense attorneys. DOJ is looking into Ethics Education.

► FORM 8300 -- It was reported that a District Court judge in Kansas suspended a summons against an attorney because of "ethical concerns." Nevertheless, the fight still continues.

Finally, Reid reported the membership of the WCCC to be approaching 800. While turnouts at some functions are large, there is a larger number of people who do not actively participate in the committee and are not Section or even ABA members. Those people who have not kept current with their dues, without justification, will be dropped from the committee rosters in order to alleviate the financial burden on the Committee. To illustrate, a recent mailing cost \$2,400 to reproduce, let alone the postage. Reid asked that if the Committee members new of inactive members to bring the matter to their attention, and he asked that current members keep up with their dues.

R.S.V.P. SLIP

Please Mail or FAX by May 19, 1994 to:

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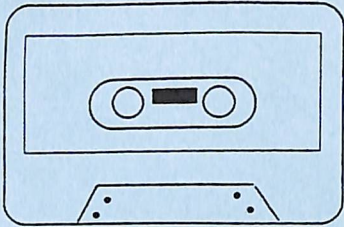
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Bank Fraud

A Newsletter of the White Collar Crime Committee Section of Criminal Justice American Bar Association

Volume 2, No. 1

Summer-Fall 1993

STATISTICS

Major Financial Institution Fraud Prosecutions (October 1, 1988 - March 31, 1993)

Criminal Cases

	S&Ls	Banks	Credit Unions	Total
Information/Indictments:	919	1968	119	3006
Estimated Loss:	\$ 9292*	\$ 4467*	\$ 139.9*	\$ 13,898.9*
Defendants Charged:	1475	2740	155	4370
Convictions:**	1193	2263	133	3589
Acquittals:	90	54	1	145
Conviction Rate:	93.0%	97.7%	99.2%	96.1%
% Sentenced to Jail:	77.9%	77.6%	82.4%	77.2%
Fines Imposed:	\$ 17,614*	\$ 8,361*	\$95,250*	\$ 26,070*
Restitution Ordered:	\$629,458*	\$536,662*	\$15,464*	\$1,118,544*

a Denotes millions.

** Not including defendants awaiting trial.

Civil Enforcement (FIRREA § 951)

Investigation:	740
Cases Filed:	48
Trials:	0
Settlements:	22
Settlement Awards:	\$3,376,400
Judgments:***	\$2,389,804

*** Including defaults.

Source: Department of Justice, Attacking Financial Institution Fraud:
Fiscal Year 1993 Second Quarterly Report

GERALD STERN NOMINATED TO BE SPECIAL COUNSEL

On October 6, 1993, President Clinton nominated Gerald Stern to the post of Special Counsel for Financial Institutions Fraud within the Department of Justice. Stern had spent the past eleven years in Los Angeles as an executive vice president and senior general counsel for Occidental Petroleum Corp. He retired from Occidental on December 30, 1992.

Before moving to Los Angeles, Stern practiced law in Washington, D.C., as an associate and later as a partner with the law firm of Arnold and Porter. While practicing law with Arnold and Porter, Stern was the lead counsel for over 6,000 survivors of West Virginia's Buffalo Creek coal mine disaster. His book, The Buffalo Creek Disaster, is his personal account of the lawsuit against the coal mine company.

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FINANCIAL INSTITUTION FRAUD: CONGRESS STILL STRUGGLES TO RESPOND CONSISTENTLY

by Michelle D. Bernard and Eva Marie Shivers
Shaw Pittman Potts & Trowbridge
Washington, D.C.

INTRODUCTION

Banking and other financial institution fraud has generated big headlines in the news. The involvement of public funds, lost depositors' money, and broken laws have contributed to a series of responses from Congress. Hearings, investigations, resolutions and, ultimately, legislation in recent years have filled volumes in attempts to remedy and hopefully prevent future financial institution scandals.

These scandals, most notably involving the failed savings and loans, the House Bank, BCCI and BNL, have had enormous implications for the voting and tax-paying public. And as a result, constituents have placed extreme pressure on their lawmakers to take appropriate action. Congress has made notable efforts to meet the public's demands even in the case where the political future of those involved was threatened, e.g. in the House Bank scandal by disclosing banking records for the public's scrutiny. Thus, beginning in the last session of Congress and continuing to the present, Congress has had to deal with cleaning up its own house as well as the mess left behind by private bankers' mistakes and regulatory missteps.

THRIFT BAILOUTS

The first major example of Congress' response to financial institution fraud and scandal involves the failed savings and loans. One measure approved by the House Judiciary Committee recently as part of the 1993 thrift bailout bill would extend from three to five years the time in which the Resolution Trust Corporation ("RTC"), the thrift cleanup agency, has to sue thrift officials after it has taken over a failed institution in cases of fraud or "intentional misconduct" in which savings and loan officials unjustly enriched themselves. Before its

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FINANCIAL INSTITUTION FRAUD

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Thanksgiving adjournment Congress acted to approve the measure. Representative John Conyers, Jr. (D-Mich.) summed up Congress' purpose: "Given the truly extraordinary circumstances here, which involve the biggest rip-off to taxpayers in American history, I believe the least Congress could do is provide prosecutors with all the available tools necessary to prosecute and recover monies from all those involved in looting the S&Ls." (Congressional Quarterly, June 12, 1993, p. 1468). The fact that the General Accounting Office ("GAO") report criticized government efforts to prosecute less than all criminal referrals and its failure to recover dollars lost or ordered in restitution has added more fuel to the fire.

Both the House and the Senate introduced bills that appropriate money to RTC financing of closures and mandate RTC reforms, including strengthening internal controls of RTC against waste, fraud and abuse. Again, Congress relented at adjournment to approve new funds.

BANCA NAZIONALE DEL LAVORO (BNL)

Another example of Congress' response to banking scandal involves a hearing of the House Banking Committee at which Democrats charged that the Bush Administration backed Saddam Hussein's regime in Iraq with billions of dollars in agricultural loan guarantees in spite of evidence of fraud and corruption in the program. Democrats on both the House and Senate Judiciary Committees formally asked former Attorney General William P. Barr to request appointment of an independent counsel to investigate possible criminal wrongdoing by administration officials. Barr turned down this request, and instead appointed his own special prosecutor for BNL, saying that there are "no reasonable grounds" to warrant further investigation. Former Federal Judge Frederick Lacey found no grounds for such an investigation. (Congressional Quarterly, December 12, 1992, p. 3809).

Congressional leaders subsequently vowed to push for enactment of a new independent counsel statute and obtained the backing of President Bill Clinton. In the meantime, the Senate Intelligence Committee continued its investigation of the matter and found that ineptness and inadequate communications between the CIA and the Justice Department -- rather than intentional wrongdoing -- impeded the government's handling of the case against the indicted Atlanta branch manager of BNL, Christopher Dragoul. (Congressional Quarterly, October 31, 1992, p. 3489). Trial of the Dragoul case, scheduled to begin in September 1993, ended in a surprise plea bargain. Meanwhile, the degree of Administration involvement remains unresolved.

SPECIAL COUNSEL

(Continued From Page 1)

From 1961 to 1964, Stern was a trial attorney with the Justice Department's Civil Rights Division, and tried voting discrimination cases in Mississippi, Alabama, and Louisiana. During that time he played a key role in the Department's efforts to protect James Meredith, the first African-American student to attend the University of Mississippi.

As Special Counsel, Stern will be given authority to supervise and coordinate financial institution fraud investigations and prosecutions throughout the country. He will report to the Deputy Attorney General.

The Crime Control Act of 1990 established the Financial Institutions Fraud Unit within the Office of the Deputy Attorney General, headed by a Special Counsel, for a period of five years. 28 U.S.C. § 509. From January 1991 until January 1993, Ira Raphaelson, former acting United States Attorney for the Northern District of Illinois, served as Special Counsel.

The 1990 Act also authorized the Attorney General to establish a "Senior Interagency Group," chaired by the Special Counsel, to assist cases and in allocating investigative and prosecutorial resources where they are most needed. 28 U.S.C. § 509. The "Senior Interagency Group" consists of senior officials of the Department of Justice, the Department of the Treasury, the Office of Thrift Supervision, the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration.

Since 1989 with the enactment of the Financial Institutions Reform and Recovery Enforcement Act (FIRREA), enormous resources within the Department of Justice have been devoted to the prosecution of financial institution insiders, particularly, former savings and loan executives and major borrowers. According to its latest report to Congress, since October 1, 1988, the Department of Justice has convicted over 3500 defendants in "major" financial institution fraud cases. A major financial institution fraud case is defined as one that involves losses of at least \$100,000 or a case (with any loss) involving fraud committed by a senior officer of the institution.

Stern has told Bank Fraud editors that he sees his job as primarily a manager of the vast prosecutive resources designated for financial institution fraud and civil recovery -- a job not unlike his previous one as a manager of the many lawyers employed and retained by Occidental Petroleum.

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BANK OF CREDIT AND COMMERCE INTERNATIONAL (BCCI)

Perhaps one of the world's biggest banking scandals to take center stage on Capitol Hill is the BCCI scandal. BCCI was closed in 1991 in a global crackdown after investigators of various governments uncovered widespread fraud involving billions of dollars and various other crimes, including bribes to leaders around the world, arms trafficking, income tax evasion, smuggling and illicit bank acquisitions.

In response to concerns that BCCI evaded banking regulations for a decade, Congress and the administration moved to strengthen federal oversight of foreign banks in the United States and the authority of the Federal Reserve System ("Fed"). The House and Senate bills proposed to give the Fed broad new authority and impose some new requirements on foreign bankers seeking to do business in the United States. (Congressional Quarterly, September 7, 1991, p. 2548).

Besides the proposed legislation, Congress also conducted hearings which began in September 1991, and provided the clearest public view of events. The House Banking Committee, along with its counterpart in the Senate and the Senate Ethics Committee, conducted investigations, some of which continued into 1993. (Congressional Quarterly, April 10, 1993, p. 906). But for all the activity, the picture still remains clouded by rumor and, in light of the acquittal of lawyer Robert Altman recently in a New York state prosecution, unsubstantiated allegations.

THE BUCK STOPS HERE-- HOUSE BANK SCANDAL

The above examples have displayed Congress' propensity toward exposing the wrongdoer in financial institution fraud and finding a way to protect the public from future harm. But perhaps Congress' most gruelling test came when their own House Bank heated up the front pages of newspapers with talk of a scandal that some believe mirrored a failed S&L overrun with check-kiting and other fraud. Congress had to face the difficult task of deciding whether to protect the more innocent of its members with overdrawn accounts or expose all members to public scrutiny in the mode of full disclosure.

The House Bank had operated for more than 150 years outside the system of checks and balances. Too often, there were plenty of checks but not enough balances. An examination of its history reveals an institution that was plagued by scandal from just after its inception until 1991 when the House closed the bank to quieten the controversy over revelations that members were regularly floating bad checks without penalty.

The House Bank was a small institution in which most members deposited their paychecks and had checking accounts. The bank had a long-standing practice of allowing

members to overdraw their accounts by up to the amount of their next monthly paycheck -- without charging the penalties that commercial banks levy. Speaker of the House Thomas D. Foley (D-Wash.) apparently first learned in December 1989 about the problems of the House Bank and twice asked for commercial bankers to help clean it up, but failed to follow through on those efforts.

Investigation

In September 1991 the General Accounting Office ("GAO") released a report on how members had been using and abusing their freedom to kite checks. The House hurried to close the bank and passed a resolution ordering an investigation by the Committee of Standards of Official Conduct (the Ethics Committee). The resolution told the Ethics Committee to determine who was "routinely and repeatedly" writing checks that exceeded their balances by a "significant amount." The Ethics Committee appointed a subcommittee of six members who had not overdrawn their bank accounts to analyze bank records and make recommendations. The investigation covered a 39-month period from July 1, 1988 to October 3, 1991. Despite the Ethics Committee's recommendation that only the worst offenders be exposed for abusing their banking privileges, the House voted to disclose the identity and records of all those who wrote bad checks during the three-year period. (H. R. Res.396).

A list of 303 overdrafters was the result of the second stage of the Ethics Committee's two-part report on its investigation of the House Bank. Many, if not most, members on the list said they had no idea they had ever overdrawn their account, because the bank often held checks until a deposit was made without telling account holders, and monthly statements did not show a negative balance for held checks. The list of 303 represented a broad cross section of the House: Democrats and Republicans, committee chairmen and freshmen, relatively anonymous veterans and rising stars. (Congressional Quarterly, April 18, 1992, p. 992).

Although members said that they believed the practice of check-kiting violated no House rules or law, the Justice Department appointed a special counsel to see if any laws were broken. Subsequently, the House voted to give detailed bank records to the Justice Department to aid in its criminal probe of members' checking habits. (H. R. Res.441). The records included more than three years of personal banking records for about 500 current and former members -- checks, deposit slips, balance statements and, most important, records showing the overdrafts at the heart of the scandal.

Attempts to Protect Members

Throughout the House Bank scandal, House leaders followed their instinct, which was to protect incumbent members from their constituents. This was first evident when the Ethics Committee strained to sustain its position of limited

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FINANCIAL INSTITUTION FRAUD

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disclosure against critics who sought broad disclosure -- calling for all members' records to be disclosed.

One of the overriding considerations in the full House vote to disclose the identity and records of all those who wrote bad checks was the hope of restoring the tarnished institution's credibility. House Speaker Foley said, "I hope it will be clear to the country that we are not hiding any information, embarrassing as it may be, misleading as it may be, in many cases unjust to members as it may be." (Congressional Quarterly, March 14, 1992, p. 599).

All members agreed that the bank's records were not completely accurate and that some innocent members would be wrongly tarred as occasional check-kitters. But the House decided that those members would have to tough it out so that those who floated numerous checks could be exposed. Many members also realized that limited disclosure of only the worst offenders might be viewed as a cover-up when the public was demanding a fuller accounting.

Another example of the House leadership's attempt to protect its members came up when retired federal judge Malcolm R. Wilkey, the Justice Department's special counsel, subpoenaed more detailed information regarding members' banking records. House leaders were outraged and said that the subpoena violated privacy rights and the Constitution's separation-of-powers doctrine.

But House leaders failed to convince the troops that the fight was worth the political risk of looking like they were protecting wrongdoers. Some critics of the House leadership stated that the Democratic leadership was trying to cover up the House banking scandal. However, the members voted 347-64 to approve a resolution (H. R. Res.441) to turn over all the requested information to the Justice Department. Members of the House bit the bullet in spite of the feeling that turning over the personal banking records meant that the Republican controlled Justice Department would have in its hands the political equivalent of captured enemy documents -- top secret records from the overwhelmingly Democratic House. The House thus decided the public's interest in a scandal-free Congress outweighed concerns over the balance of power and individual rights.

After a full investigation, the special counsel in December 1992 found only "a quite limited" number of members worthy of further criminal investigation. That investigation is ongoing. Clearly, some members, in losing reelection battles or making decisions to retire, already had paid a high price for the loose operations of the House Bank. Others face possible Federal Election Commission inquiries based on the disclosed records.

NEW DEVELOPMENTS

Sentences

United States v. William W. Batastini, et al., Crim. No. 92-331-1 (N.D. Ga.). On September 15, 1993, Batastini, a former chief financial officer of the National Bank of Georgia (NBG), was sentenced to 18 months in prison with three years of supervised release. He was also ordered to pay \$50,000 in fines, \$36,657 in restitution, and \$46,575 in court costs.

Batastini was indicted in September 1992, along with Gaith R. Pharon, former owner of NBG, Tariq Jamil, a former Bank of Credit and Commerce International (BCCI) and NBG officer, and Swaleh Naqvi, former head of BCCI. Batastini was convicted on March 31, 1993, of conspiracy to defraud the United States (18 U.S.C. § 371). He was also convicted of filing a false tax return which omitted the receipt of \$95,000 paid to him by Pharon and BCCI in return for his part in the acquisition of NBG by First American Bank and for other favors done for his co-defendants (26 U.S.C. § 7206(1)). The money had been disguised as a baby gift to Batastini's wife. Batastini's co-defendants remain fugitives. (DOJ: Jeannemarie Gardes, Fraud Section, Joseph Bender and Joseph Giannullo, Tax Division; Defense: Jeffrey Livingston and Donald Samuel).

United States v. Charles H. Howard, III, Crim. No. 92-7401-D (D. N.H.). On September 2, 1993, Howard, of Jaffrey, New Hampshire, was sentenced to five years imprisonment, five years probation thereafter and a special assessment of \$100. Howard pleaded guilty on September 16, 1992, to one count of conspiracy to commit insider trading, bank bribery and bank fraud (18 U.S.C. § 371), and one count of bank fraud (18 U.S.C. § 1344).

Howard was a former stock broker and a Director and First Vice President of Thompson McKinnon Securities, Inc., a brokerage house with principal executive offices in New York City. From approximately 1984 through October 31, 1987, Howard provided financial advice and executed trades in the securities of New England banking institutions. During this period, Howard invested hundreds of millions of dollars in the stocks of New England banks. Four New England banks -- Amoskeag Bank, United Saves Bancorp, Inc., Suffield Financial Corporation and BankVermont Corporation -- invested approximately \$200 million through Howard. Howard conspired with other individuals to commit insider trading in the stocks of these banks and the stock of Coastal Bancorp, Inc. Howard also conspired to commit bank bribery and bank fraud. (DOJ: AUSA Mike Connolly, John Moon, Fraud Section; Defense: Kenneth P. Glidden).

United States v. Nolin W. Ragsdale, Crim. No. 4-93-CR-19 (E.D. Tex.). On August 1, 1993, Ragsdale, former President and Chairman of the Board of Directors of Northwest Bank of Roanoke, Texas, was sentenced after conviction by a jury on all four counts of an indictment. Ragsdale was

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NEW KEY DEVELOPMENTS

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sentenced to imprisonment for 30 months and was ordered to make restitution in the amount of \$92,850. In addition, Ragsdale was ordered to reimburse the government for the \$3,313 cost of his court appointed counsel. Ragsdale and co-defendant Carl J. Hardeman were charged with conspiracy (18 U.S.C. § 371), misapplication of the funds of a financial institution (18 U.S.C. § 656), and false entries in the records of a financial institution (18 U.S.C. § 1005). The offenses were committed prior to November 1, 1987, and thus were outside of the Sentencing Guidelines.

The conspiracy involved a \$300,000 loan from Northwest Bank. The indictment alleged that Ragsdale, as President of Northwest Bank, made the loan to Hardeman through a third party who was acting as a "nominee borrower" for Hardeman. Ragsdale also caused false entries to be made in the records of Northwest Bank and the Federal Deposit Insurance Corporation in order to conceal the true nature of the loan. (DOJ: J. Andrew Williams, Fraud Section, AUSA Michael E. Savage; Defense: Bill Loveless).

United States v. Reggie L. Schleisman, Crim. No. 3:92-CR-060-T (N.D. Tex.). On August 5, 1993, Schleisman was sentenced by U.S. District Judge Robert B. Maloney to two years probation and fined \$3,000. The sentencing follows Schleisman's guilty plea on May 20, 1993, to one count of structuring currency transactions in violation of 31 U.S.C. § 3524(3) and § 3522(a).

Schleisman is a Certified Public Accountant and one-time Chief Financial Officer of Louis G. Reese, Inc., a corporation owned by Dallas developer Louis G. Reese, III. Reese is presently serving a five-year prison sentence for tax and bank fraud crimes. Schleisman conspired with Louis G. Reese, III, and his wife to evade currency transaction reporting requirements by structuring Louis Reese's cash hoard of approximately \$300,000 into cashier's checks. Reese's wife and Schleisman used cash to purchase 37 cashier's checks in amounts less than \$10,000 at 28 different financial institutions in an attempt to conceal the existence of the money from Reese's creditors, including the Federal Deposit Insurance Corporation. (DOJ: Mike Rosenthal, Tax Division; Defense: William Ravkind and Tom Mittlestat).

United States v. Milo L. Pike, Crim. No. Cr-93-0201-M (D. N.H.). On August 4, 1993, Pike, of Gilford, New Hampshire, was sentenced to three years probation and fined \$20,000 by United States District Judge Steven McAuliffe based on his conviction for conspiracy to commit insider trading in the stock of First NH Banks, Inc. As a condition of Pike's probation, he must perform 750 hours of community service over the course of three years. The information to which Pike pleaded guilty on January 11, 1993, charged that Pike conspired to violate the securities laws in connection with trading in First NH stock. (DOJ: AUSA Mike Connolly, John Moon, Fraud Section; Defense: Joseph J. Byk, Jr.).

United States v. Paul S. Cheng and Edward Heath, Crim. No. 3-89-244T (N.D. Tex.). On December 2, 1993, District Judge Robert Maloney reduced Cheng's sentence for bank fraud and other crimes at Guaranty Federal Savings and Loan Association from 30 years to 20 years. On December 16, 1993, Cheng's co-chairman Heath received a reduction in sentence from 20 years to 7 years. (DOJ: AUSA Terri Galligher; Defense: Abbe Lowell, Howard Gutman, Washington, D.C.).

United States v. Bruce West, Crim. No. 4:92 CR 22 (E.D. Tex.). On June 18, 1993, West, borrower at Vernon Savings and Loan Association, was sentenced to serve 5 years and 10 months in prison for bankruptcy fraud and was ordered to pay \$1,086,000 in restitution. (DOJ: Mike Love, Fraud Section; Defense: Mike Fawer, Dallas, Texas).

Indictments

United States v. Clary William Wester and Robert F. Fredo, Jr., Crim. No. 93-10224-GN (D. Mass.). On August 11, 1993, Wester, former Chairman of the Board of Directors and President of First Service Bank for Savings (First Service), and Fredo, former Senior Vice President of First Service, were indicted in the District of Massachusetts. A federal grand jury charged Wester on 16 counts of conspiracy (18 U.S.C. § 371), misapplication (18 U.S.C. § 656), unlawful receipt of funds (18 U.S.C. § 215) and tax evasion (26 U.S.C. § 7201). Fredo was charged in 14 counts of the indictment with conspiracy, misapplication and unlawful receipt.

The indictment charges that, as officers of First Service, defendants Wester and Fredo would receive undisclosed personal financial benefits, including payments of \$990,000 and the release of their personal guaranties on a \$12.4 million loan. (DOJ: Mark Adler and Pamela Merchant, Fraud Section, Kent Sands, Tax Division; Defense: Stephen Delinsky and William Kettlewell).

United States v. Charles W. Putnam, Jr., and Mark A. Bradford, Crim. No. 3:93-CR-293-T (N.D. Tex.). On August 25, 1993, a grand jury returned a two-count indictment charging Putnam and Bradford, both Dallas area developers, with one count of conspiracy (18 U.S.C. § 371) and one count of bank fraud (18 U.S.C. § 1344). According to the indictment, the defendants, as a condition for obtaining two loans from Caprock Savings and Loan Association, agreed to divert a total of \$350,000 from the proceeds of the two loans for the use of the officers and directors of Caprock Savings. The defendants agreed to structure the transactions to give the false appearance that they were purchasing title company rights from a wholly owned subsidiary of Caprock. The defendants personally received \$125,000, disguised as a commission, for their role in these transactions. (DOJ: Andrea Pustejovsky, John Scott, Fraud Section; Defense: Charles Meadows and Michael McCue).

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NEW KEY DEVELOPMENTS

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United States v. Harvey D. McLean, Jr., Crim. No. 3:93 Cl 5 (E.D. Tex.). On September 7, 1993, a federal grand jury sitting in the Eastern District of Texas returned a four-count indictment charging former Paris Savings and Loan Association (Paris Savings) Chairman of the Board, Harvey D. McLean, Jr., with conspiracy (18 U.S.C. § 371), misapplication (18 U.S.C. § 657), and false entry (18 U.S.C. § 1006). Now the indictment alleges that in late 1985 McLean artificially enhanced the financial appearance of Paris Savings by overfunding a loan that benefited Louis G. Reese, a Dallas real estate investor, on the condition that Reese use a portion of the excess funds to purchase a parcel of real estate owned by Paris Savings. The indictment alleges that as a result of the sale of its real estate, Paris Savings recorded a profit. The indictment further alleges that the scheme involved two loans from Paris Savings that totalled over \$9 million. (DOJ: J. Andrew Williams and R. Scott Taylor, Fraud Section; Defense: Kim Wade).

United States v. Daniel Young, Ind. No. 460793 (Sup. Ct. N.Y.). On May 17, 1993, a Manhattan grand jury indicted Young on charges of bribery and banking law violations that resulted in \$500,000 profits to Young and his partner but almost \$1 million in losses at Manufacturers Hanover Trust Co. The defendant, together with George Liberatore, also charged with conspiracy, caused a junior employee at the Bank to sell a portion of a Third World bank loan at a discount to a venture formed by Liberatore, but in which Young had an undisclosed financial interest. (D.A.: Robert Morgenthau; Defense: Kindler N. James).

United States v. Zolton A. Phillips, et al., Crim. No. 93-10097Y (D. Mass.). On April 2, 1993, a federal grand jury indicted Phillips and Thomas W. Callahan for conspiracy, bank fraud and false statements. Phillips as developer and Callahan as attorney allegedly diverted over \$600,000 of a \$1.2 real estate loan, backed by a financial statement understating Phillips' liabilities, and \$900,000 of a \$3.25 loan for a sham sale to a nominee. (DOJ: Paul M. Glichman, Anita S. Lichtblau, Mark Adler, Fraud Section; Defense: John LaChange and Gary Crossen, Boston).

Pleas

United States v. Christopher Drougal, Crim. No. 91-CR-078 (N.D. Ga.). On September 3, 1993, Drougal, the main defendant in the BNL bank fraud case, entered a plea of guilty to three felony counts. The case had been set for trial beginning September 8.

Drougal originally was named in a 347-count indictment in February 1991. He entered a plea of guilty to 60 counts in June 1992. A lengthy sentencing hearing was held in September 1992, after which Drougal's motion to withdraw his plea was granted. A superseding indictment was issued in July 1993, narrowing the charges to 70 counts. Drougal's

negotiated plea was to one count of wire fraud (18 U.S.C. § 1343) and two counts of making a false statement to the Federal Reserve (18 U.S.C. § 1001). (DOJ: John Hogan, Director, BNL Task Force, and Special Assistant to the Attorney General, John Michelich, Fraud Section, AUSAS Howard Heiss, Reid Figel, and Randy Chartash; Defense: Robert Simels).

United States v. Kerry D. Shawell, Crim. No. G-92-22 (S.D. Tex.). On May 28, 1993, Shawell pleaded guilty to bank fraud at Continental Savings Association of Houston by omitting legal debts on his financial statements for a \$16,500,000 loan. He also pleaded guilty to false statements in a loan application at Delta Savings Association of Alvin, Texas, in which he served as a nominee borrower to avoid loans to one borrower regulations. (DOJ: AUSAS Katherine Haden, Fred Dailery and Larry Eastepp, Fraud Section; Defense: Chris Monical).

United States v. Donald Branham, Crim. No. H-93-6(2) (S.D. Tex.). On June 4, 1993, Donald R. Branham, former business executive, entered guilty pleas to one count of conspiracy, one count of bank fraud, and 20 counts of aiding and abetting the misapplication of funds involving Texas Banc Savings Association of Conroe, Texas. The scheme involved drafts on Branham's foreign bank account in London, England and resulted in losses of \$1.8 million. (DOJ: AUSA Bryan Best, Julia Bowen Stern, Houston; Defense: Robert Sussman).

United States v. Edmund Reggie, Crim. No. 90-60045-01 (W.D. La.). On July 26, 1993, Reggie, acquitted in June 1992 and convicted in September 1992 of bank fraud charges in separate trials, resolved his remaining charges by pleading nolo contendere to misapplication of \$425,000 from Acadia Savings and Loan Association. (DOJ: AUSA Duro J. Duplechin; Defense: William H. Jeffress, Jr., Washington).

United States v. Ernest J. Russ, Crim. No. 93-363 (D.D.C.). On October 5, 1993, Jack Russ, Sergeant at Arms of the United States House of Representatives and supervisor of the operation of a banking facility for the use of members and others ("House Bank") pleaded guilty to embezzlement by a custodian of public funds (18 U.S.C. § 648), filing a false statement and wire fraud. In addition to cashing 17 checks exceeding \$75,000 at the House Bank with insufficient funds, Russ deceived investors in a flag case company he owned to use their proceeds for various purposes, including clearing insufficient funds checks, and also filed a false financial disclosure statement with the Clerk of the House of Representatives. Russ on December 17, 1993 was sentenced to serve two years. (DOJ: Thomas J. Eicher, Jonathan J. Rusch, House Bank Task Force; Defense: Paul Knight).

United States v. John O'Donnell, Crim. No. CR-93-240 and CR-93-344 (C.D. Cal.). On May 18, 1993, O'Donnell, former Republic Bank president admitted that he defrauded the bank and Los Angeles area investors of nearly \$5 million. O'Donnell, who is also a former official of the Federal Deposit

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NEW KEY DEVELOPMENTS

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Insurance Corporation, pleaded guilty to 18 counts of bank fraud, securities fraud, wire fraud and money laundering. O'Donnell faces up to 155 years in Federal prison and \$7.5 million in fines. The bank fraud charges stemmed from about \$550,000 in unsecured loans that O'Donnell obtained from Republic Bank between 1986 and May 1990, while he was president. O'Donnell was sentenced to 41 months and fined \$2.8 million in restitution. The bank is a subsidiary of American Republic Bancorp of Torrance, California. (DOJ: AUSA John Libby; Defense: Richard Walton, Los Angeles).

Convictions

United States v. Thomas M. Gaubert, Crim. No. 4:92CR42 (E.D. Tex.). On June 24, 1993, a jury convicted Gaubert, former owner of Independent American Savings Association, of 10 counts of bankruptcy fraud, concealment of assets from FDIC, and money laundering. Directions to employees and false documents enabled Gaubert, the indictment alleged, to conceal \$333,000 in cash and rent receipts from a housing complex he controlled. This conviction marked the 200th obtained by the Dallas Bank Fraud Task Force. (DOJ: AUSA Linda Graves, Vic Conrad and John Scott, Fraud Section; Defense: pro se).

United States v. Harry J. Hart, Crim. No. 3:93CR43WN (S.D. Miss.). On July 19, 1993, a jury convicted Hart of filing a false statement with Republic Bank for Savings. Hart did not disclose various debts on his loan application to obtain \$3.4 million to build a movie theater complex. (DOJ: AUSA Don Burkehalter; Defense: George Lucas).

United States v. Ira S. Saul, Crim. No. 93-00108 (E.D. Va.). On June 3, 1993, a jury convicted real estate attorney Saul of four counts of bank fraud in a scheme to inflate the sales contracts on residential lots and thereby obtain from the bank (Liberty Savings Bank of Warrenton, Virginia) in excess of 100 per cent financing for the sale of the lots. The bank had been led to believe that it was loaning only 80 per cent of the purchase price. The jury acquitted Saul on the conspiracy count. Northern Virginia developer, Carter V. Boehn, pleaded guilty to bank fraud and testified as a government witness. (DOJ: AUSA Stephen P. Learned; Defense: J. Frederick Sinclair and Charles W. Kramer).

Acquittals

United States v. George Urban, Crim. No. 93-200A (E.D. Va.). On July 12, 1993, a jury in Alexandria, Virginia acquitted Urban of making a false statement in a loan application for the purpose of influencing the bank's action. The evidence showed that the statements were submitted to a mortgage company, not the bank to which the loan was assigned at closing. The court instructed the jury that the defendant must be shown beyond a reasonable doubt to have known at the time of submitting the statement that it would be presented to the bank in order to find

the intent to influence the bank's action. (DOJ: AUSA David Barger and Special AUSA Robert Nicholson; Defense: Jim Cole, Margaret Jennings, Washington).

United States v. Kenneth E. Rolston and Gene H. Rankin, Crim. No. G-92-16-01 (S.D. Tex.). On April 12, 1993, Rolston and Rankin were acquitted in the United States District Court for the Southern District of Texas, Galveston Division, of all charges contained in a five count indictment. The indictment alleged in Counts One and Two that Rolston, an officer, director and agent at Alvin State Bank and Commercial State Bank, was aided and abetted by Rankin in misapplying bank funds. Additionally, Rolston was charged with making false entries in the books and records of Alvin State Bank, Commercial State Bank and Highlands State Bank (Counts Three, Four and Five). These charges were based on three loans, one at each of the above-listed banks, made to Rankin. The stated purpose on the applications of the loans were "business expense" or "working capital." Rankin then used the funds to pay debts owed by him to Rolston.

The basic theory of the prosecution was that such loans amounted to misapplication and, because Rolston failed to cause his "interest" in the loans to be noted in the books and records of the banks, he made false entries by omission. At the trial, the Government introduced the loan documents and charted out the flow of money from the banks to Rankin to Rolston. The original loan officers were called to testify, but were unable to provide many specifics about the loans due to the passage of time.

Rankin testified that he did disclose that the loans were to be used to pay off business debts owed to Rolston and assumed Rankin had fully disclosed the purpose of the loans; therefore no further disclosure by Rolston was necessary. Both defendants testified to reliance on legal advice prior to the transactions. An expert in banking law was also called and testified to the similarity between this transaction (using loans from a bank to discharge a pre-existing debt) and one in which a borrower uses loan funds to buy a car from a bank insider.

Rankin was acquitted following the Government's evidence pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure; Rolston was acquitted by the jury. (DOJ: AUSAS Richard Banks and F. John Wagner, Jr.; Defense: Michael J. Hinton and Mitchell B. Lansden).

Appeals

FDIC v. Faulkner, et al., No. 92-1438, ___ F.2d ___ (5th Cir., May 25, 1993). On May 25, 1993, the Fifth Circuit Court of Appeals held that an FDIC prejudgment asset freeze can prevent a defendant's transfer of any assets upon refusal to cooperate in determining which assets were traceable to fraudulent activity. The court upheld an order also enjoining defendant's wife, although she was not a party. (FDIC: Manuel Palau; Defense: William H. Jeffress, Jr., Washington).

(Continued on Page 8)

NEW KEY DEVELOPMENTS

(Continued From Page 7)

In re Soderling (FDIC v. Soderling), No. 91-16406, ___ F.2d ___ (9th Cir., July 13, 1993). On July 13, 1993, the Ninth Circuit Court of Appeals held that a criminal restitution judgment payable to FDIC is not dischargeable in bankruptcy both as to defendant's separate property and as to community property under the "community claim" exception from discharge. The court ruled that federal criminal restitution is a debt under the California community property law. (FDIC: Bob Russell; Defense: Laurel Rest).

United States v. Thomas S. Waldron, No. 93-7340 (5th Cir., October 18, 1993). The District Court (S.D. Miss.) had dismissed two overt acts alleged to put a conspiracy charge within the Sentencing Guidelines. Waldron, a borrower at Republic Bank for Savings, Jackson, Mississippi, and two co-defendants allegedly held a post-November 1, 1987, meeting "to discuss their criminal liability" and Waldron paid legal defense fees through and after April 1992 needed as a result of a co-defendant's activities. The District Court reasoned that the acts were acts of concealment, not part of the conspiracy. The Fifth Circuit found that the Government's appeal was not proper as an interlocutory appeal issue. Subsequently, having been convicted of bank fraud in Louisiana, Waldron's company pleaded guilty in Mississippi and was ordered to pay restitution of \$1 million. The charges against Waldron personally were dismissed. In Louisiana, Waldron was sentenced to two consecutive 18-month terms of

imprisonment and was ordered to pay \$2 million in restitution. (DOJ: AUSAS Don R. Burkhalter, Mervyn Hamburg; Defense: John M. Colette and Thomas E. Royals, Jackson, William H. Jeffress, Jr., Washington, James E. Boren, Baton Rouge).

Matter of Coston, No. 92-4399, ___ F.2d ___ (5th Cir., May 24, 1993)(en banc). The Fifth Circuit Court of Appeals, on May 24, 1993, reversed its prior rule in In re Jordan, 927 F.2d 221 (5th Cir. 1991), and held that whether a bank reasonably relied on a false financial statement is an issue of fact in a bankruptcy proceeding and therefore is subject to review only under a clearly erroneous standard.

Statistics

New England Bank Fraud Task Force. As of September 30, 1993, the Justice Department's task force headquartered in Boston had charged 47 defendants and had obtained 33 convictions. (DOJ: Deborah Smith, Fraud Section).

Dallas Bank Fraud Task Force. As of December 31, 1993, the Dallas Bank Fraud Task Force had charged 260 defendants and had obtained 211 convictions. (DOJ: Tom Hamilton, Fraud Section).

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and accordingly, should not be construed as representing the policy of the American Bar Association.

NEXT ISSUE: EXTRADITION IN BANK FRAUD CASES

Please send information on new cases, trials, appeals, sentences, jury instructions and other developments to Bank Fraud editors Robert Hauberg, Watkins Ludlam & Stennis, P.O. Box 427, 633 North State Street, Jackson, MS 39205-0427 (FAX (601) 949-4804), and Steve Learned, United States Attorney's Office, 1101 King Steet, Suite 502, Alexandria, VA 22314 (TEL (703) 706-3779). Suggested articles for the "Focus" section are welcome. Assistance in identification of defense counsel for the "New Key Developments" section is requested.

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May 9, 1996

TO: (Name, office symbol, room number, Agency/Post)

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Mary Frances Harkenrider
Counsel to AAG, Criminal Division

Phone No.

4-2419



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 4 1995

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: /S/ John C. Keeney
Acting Assistant Attorney General

SUBJECT: Use of Sentencing Appeal Waivers to Reduce the Number
of Sentencing Appeals

This memorandum provides guidance regarding the possible use of waivers of sentencing appeal rights and post-conviction rights in plea agreements. The Department recognizes that many districts currently incorporate such waivers into plea agreements. We believe that the use of these waivers in appropriate cases can be helpful in reducing the burden of appellate and collateral litigation involving sentencing issues. United States Attorneys' offices should evaluate whether waivers of sentencing appeal rights and post-conviction rights would be a useful addition to plea agreements in their districts and, if so, the extent and scope of such waivers.

(1) Legality

At the outset, it is important to note that the Supreme Court has repeatedly held that a criminal defendant can elect to waive many important constitutional and statutory rights during the plea bargaining process. See United States v. Mezzanatto, 115 S. Ct. 797, 801 (1995); Tollett v. Henderson, 411 U.S. 258, 267 (1973); Blackledge v. Allison, 431 U.S. 63, 71 (1977). Consistent with that principle, the courts of appeals have upheld the general validity of a sentencing appeal waiver in a plea agreement. See, e.g., United States v. Allison, 59 F.3d 43, 46 (6th Cir. 1995); United States v. Schmidt, 47 F.3d 188, 190 (7th Cir. 1995); United States v. Attar, 38 F.3d 727, 731 (4th Cir. 1994); United States v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993), cert. denied, 115 S. Ct. 652 (1994); United States v. DeSantiago-Martinez, 980 F.2d 582, 583 (9th Cir. 1992), amended, 38 F.3d 394 (1994), cert. denied, 115 S. Ct. 939 (1995); United States v. Melancon, 972 F.2d 566, 567-568 (5th Cir. 1992); United States v. Rivera, 971 F.2d 876, 896 (2d Cir. 1992); United States v. Rutan, 956 F.2d 827, 829-830 (8th Cir. 1992).

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A sentencing appeal waiver provision does not waive all claims on appeal. The courts of appeals have held that certain constitutional and statutory claims survive a sentencing appeal waiver in a plea agreement. For example, a defendant's claim that he was denied the effective assistance of counsel at sentencing, United States v. Attar, *supra*; that he was sentenced on the basis of his race, United States v. Jacobson, 15 F.3d 19 (2d Cir. 1994); or that his sentence exceeded the statutory maximum, United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992), will be reviewed on the merits by a court of appeals despite the existence of a sentencing appeal waiver in a plea agreement.

(2) Scope of Sentencing Appeal Waivers

A plea bargain is a contract between the prosecutor and the defendant. Thus, the scope of a sentencing appeal waiver in a plea bargain will depend upon the precise language used in the sentencing appeal waiver provision.

(A) Broad Waivers

A broad sentencing appeal waiver requires the defendant to waive any and all sentencing issues on appeal and through collateral attack. The following waiver provision is an example of a broad approach that may be used in plea agreements:

The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under Title 28, United States Code, Section 2255.

The advantage of a broad sentencing appeal waiver is that it will bar the appeal of virtually any sentencing guideline issue. For example, in United States v. Johnson, No. 94-10529, ___ F.3d ___ (9th Cir. September 5, 1995), the Ninth Circuit dismissed the defendant's appeal because he had agreed to waive his appeal in the plea agreement. The court relied on the broad "any sentence" waiver language in the plea agreement to reject the defendant's claim that the waiver did not encompass appeal of issues arising out of a law enacted in the period between his plea and sentencing.

The disadvantage of the broad sentencing appeal waiver is that it could result in guideline-free sentencing of defendants in guilty plea cases, and it could encourage a lawless district court to impose sentences in violation of the guidelines. It is imperative to guard against the use of waivers of appeal to promote circumvention of the sentencing guidelines. All charging decisions and plea agreements are subject to the "Principles of Federal Prosecution" of the United States Attorneys' Manual (beginning at §9-27.000) and the related bluesheet issued by the Attorney General October 12, 1993. In this regard it is also important to note that the Sentencing Commission's policy statements allow judges to accept plea agreements that do not undermine the statutory purposes of sentencing or the sentencing guidelines; the policy statements also admonish the parties when using stipulations to set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics and not to include misleading facts. Guidelines Manual, §§ 6B1.2 and 6B1.4 (Nov. 1994).

Use of waiver of appeal rights in a manner resulting in sentences in violation of the sentencing guidelines could prompt a court of appeals to reconsider its decision to uphold the validity of a sentencing appeal waiver. Alternatively, the reviewing court could construe a sentencing appeal waiver narrowly in order to correct an obvious miscarriage of justice. To avoid these concerns, we recommend that, in a case involving an egregiously incorrect sentence, the prosecutor consider electing to disregard the waiver and to argue the merits of the appeal. That would avoid confronting the court of appeals with the difficult decision of enforcing a sentencing appeal waiver that might result in a miscarriage of justice.

(B) Limited Waivers

A second kind of sentencing appeal waiver is limited in some respect, most likely with regard to a particular sentence, sentencing range, or guideline application. For example, a sentencing appeal waiver could preclude appeal of sentences consistent with a recommended sentence, sentencing range, or particular guideline application agreed to by the parties. Thus, if the plea agreement provides that the prosecutor will recommend the lower half of the available sentences for a particular offense level applicable to the case (subject to a determination of the criminal history category), the plea agreement could also provide for a waiver of the defendant's right to appeal any sentence imposed within the agreed-upon lower half of the applicable range. Alternatively, the sentencing appeal waiver could be narrowed to apply to a particular guideline application. For example, if the parties agree that a two-level reduction for acceptance of responsibility applies, the plea agreement could provide for a waiver of the defendant's right to appeal any sentence on the basis of such a two-level reduction.

A variation of the above limited sentencing appeal waiver could be used where the parties do not agree to a particular sentencing or guideline application. The defendant can, nevertheless, agree not to appeal the court's determination of a particular factor. Thus, a waiver of appeal rights could apply to any determination by the court regarding acceptance of responsibility. Or, in a fraud case, where the amount of loss is disputed, the defendant could waive the right to appeal any determination within a specified range. Finally, a waiver could provide that the defendant will not appeal his sentence unless the sentence constitutes an upward departure from the guideline range deemed applicable by the sentencing court, in which case the defendant's appeal will be limited to contesting the upward departure.

The above are just some of the restricted types of waivers that can be constructed in appropriate cases; all of these waivers can extend to post-conviction rights. The advantage of a limited sentencing appeal waiver is that it is flexible and can be modified to meet the parties' needs. A limited sentencing appeal waiver may be useful when the government seeks a plea agreement, but the defendant is unwilling to plead guilty without some assurance that he will be entitled to appeal an erroneous sentence. The disadvantage of a limited appeal waiver is that it will not reduce the number of sentencing appeals as much as a sentencing appeal waiver that requires the defendant to relinquish appeal of all sentencing issues.

(3) Government's Right to Appeal

The use of a sentencing appeal waiver in a plea agreement to bar an appeal by the defendant does not require the government to waive its right to appeal an adverse sentencing ruling. The government's retention of its right to appeal the sentence while requiring the defendant to waive his right to appeal does not violate any right of the defendant. Cf. United States v. Marin, supra (noting existence of "one-sided" sentencing appeal waiver provisions in plea agreement). However, the Fourth Circuit has held that if the government wishes to retain its right to appeal the sentence while requiring the defendant to waive his right to appeal the sentence, the government must explicitly reserve its right to appeal the sentence in the plea agreement. The government's retention of its appeal rights will not be inferred by silence or omission in the plea agreement. United States v. Guevara, 941 F.2d 1299 (4th Cir. 1991), cert. denied, 503 U.S. 977 (1992). Of course, in the interest of striking a bargain, a United States Attorney's office may decide that it is necessary for the government to waive its appeal rights when the defendant takes such action. This may be especially appropriate when a negotiated plea reflects the parties' agreement in connection with a particular sentence, sentencing range, or guideline application.

(4) Ensuring that the Waiver is Knowing and Voluntary

A waiver of an important constitutional or statutory right must be knowing and voluntary to be valid. See United States v. Mezzanatto, 115 S. Ct. at 801; Boykin v. Alabama, 395 U.S. 238, 243 (1969). Therefore, prosecutors should ensure that the record reflects that the defendant knowingly and voluntarily waived his right to appeal his sentence. See, e.g. United States v. Johnson, supra; United States v. Attar, supra; United States v. Bushert, supra.

It is recommended that both the plea agreement and the Rule 11 colloquy specifically spell out the sentencing appeal waiver. The plea agreement should expressly state that the defendant understands the meaning and effect of the agreement and that his waiver of rights is knowing and voluntary. The defendant and his counsel can be required to sign those provisions separately. Two courts of appeals have found sentencing appeal waivers to be knowing and voluntary solely on the basis of the clear language of the plea agreements. See United States v. Portillo, 18 F.3d 290 (5th Cir.), cert. denied, 115 S. Ct. 244 (1994); United States v. DeSantiago-Martinez, supra.

Nonetheless, relying solely on the text of the plea agreement is risky. The better practice is for the district court to supplement the plea agreement by specifically referring the defendant to the sentencing appeal waiver provision and obtaining the defendant's express waiver of his right to appeal during the Rule 11 hearing. The courts of appeals will readily find a knowing and intelligent waiver of appeal in those circumstances. See, e.g., United States v. Marin, supra; United States v. Melancon, supra. If a district court judge fails to obtain the defendant's express waiver of appeal during the Rule 11 hearing, a reviewing court can remand the case to the district court for that purpose. See United States v. Stevens, 1995 WL 540413 (2d Cir. September 12, 1995).

(5) Other Concerns

The general acceptance of the sentencing appeal waiver in the courts of appeals has caused criminal defendants to mount systemic challenges to the sentencing appeal waiver. One common and repeated challenge to the sentencing appeal waiver is the argument that a sentencing appeal waiver is involuntary as a matter of law because the defendant will not know his actual sentence at the time that he executes the waiver. That argument has been rejected by two courts of appeals. See United States v. Rutan, supra; United States v. Navarro-Botello, 912 F.2d 318, 320 (9th Cir. 1990), cert. denied, 112 S. Ct. 1448 (1992). Rutan reasoned that the validity of a waiver does not depend on the defendant's knowledge of all of the consequences of the waiver to

be valid. When a defendant agrees to plead guilty, he does not know whether the government can prove its case and how witnesses will testify. Nonetheless, those uncertainties do not make the defendant's waiver of his right to contest the government's case invalid as a matter of law. For that same reason, the defendant's lack of knowledge of his actual sentence when he executes the waiver does not make a sentencing appeal waiver unknowing as a matter of law.

Criminal defendants are also attempting to find language in the plea agreement that allegedly authorizes them to appeal sentences despite the sentencing appeal waiver. For example, some sentencing appeal waiver provisions contain language that the defendant will be sentenced "in accordance" or "in conformity" with the sentencing guidelines. Although the obvious purpose of those provisions is to remind the defendant that he will be sentenced under the sentencing guidelines, some defendants have argued that the "in accordance" or "in conformity" language means that the defendant will be sentenced correctly under the sentencing guidelines. Thus, if the district court errs in applying the guidelines to sentence the defendant, the plea agreement has been violated, which nullifies the sentencing appeal waiver. The Ninth Circuit has rejected that argument, reasoning that the defendant's position would effectively eviscerate the sentencing appeal waiver, which assumes that an error may be committed at sentencing. See United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991).

Of course, that problem might be avoided by redrafting the plea agreement to make clear that although the defendant will be sentenced under the sentencing guidelines, he will have no right to challenge an incorrect application of the guidelines.

(6) Criminal Division Contact

If you have questions regarding sentencing appeal waivers, please contact Tom Booth of the Criminal Division's Appellate Section at (202) 514-5201 or by e-mail at CRM04(B00TH).

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March 15, 1996

Mr. Robert S. Litt
Deputy Assistant Attorney General
Criminal Division, Department of Justice
10th & Constitution Avenue, N.W., Room 2112
Washington, D.C. 20530

Re: Concerns Relating to the Use of Money
Laundering Statutes in Fraud Cases

Dear Bob:

At the last Dialogue Meeting, ABA and NACDL representatives expressed concerns about the ways in which money laundering charges were being used in some white collar fraud cases, particularly given the harshness of the sanctions being imposed for money laundering convictions under existing sentencing guidelines. We were told at the meeting to summarize our concerns and recommendations in writing since the Department is now making its own assessment of money laundering prosecution and sentencing practices in response to a congressional mandate.

Our comments follow. As you will see, we are recommending to the Department that it: 1) revise its "Blue Sheet" on Money Laundering Offenses to require departmental review prior to charging money laundering counts in non-drug related fraud cases; and 2) modify its current position on money laundering sentencing guidelines to permit the use of underlying fraud offense levels as the appropriate starting point (and, in such cases as where the fraud and money laundering conduct are the same, the end point) for imposing sanctions in fraud cases involving violations of the money laundering statutes.

Mr. Robert S. Litt
March 15, 1996
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Introduction

Although the money laundering statutes (18 U.S.C. §§1956 and 1957) were enacted in the mid-1980s primarily to criminalize the laundering and concealment of drug trafficking proceeds, the broad language of these statutes and the inclusion of mail fraud as a predicate offense have permitted their use in a variety of other contexts. In addition, courts have generally taken an expansive view of the meaning of terms such as "promote," "conceal," "proceeds," and "transaction," and have imposed little or no burden on the government to trace funds.

As a result, it is not too far-fetched to conclude that almost any fraud case which involves the use or receipt of money can include money laundering counts. And since the existing sanctions under the money laundering guidelines (51-63 months as a base level for §1956 violations, for example) were initially promulgated with massive amounts of drug trafficking in mind, the guidelines require judges to utilize disproportionately high base levels when there are convictions on money laundering counts regardless what the nature and scope of the underlying fraud may have been.

Recent court decisions demonstrate that our concerns about the potential for abuse are not idle ones. In one case, United States v. Tino, two defendants were charged with mail fraud for using improper codes in seeking Medicaid reimbursements and for seeking payments before deliveries were made in violation of complex Medicaid regulations. The alleged fraud reflected only a small percent of the medical supply company's total business. One of the defendants was convicted of mail fraud counts totaling \$28,000 over a three year time period. She was also convicted of money laundering counts for her role in depositing Medicaid reimbursements in the company's bank account and for writing checks to pay business expenses, such as rent, utilities, and supplies. Conviction under the mail fraud counts would have resulted in a sentence of 10-16 months. Because of her money laundering convictions, she was sentenced to 51 months, the lowest she could get under the guidelines. The conviction was affirmed by the Sixth Circuit and the Supreme Court denied certiorari on February 13, 1996.

And in United States v. Adams, 1996 WL 30549 (11th Cir. (Fla.)), the Eleventh Circuit upheld a 46-month sentence entirely driven by money laundering guidelines after holding that the deposit of a cashier's check in the amount of \$11,789.09 (which had been derived from defrauding the RTC) into a newly created bank account constituted concealment of proceeds from specified unlawful activity. These are far from isolated

examples. For a broader look at the disparate types of fraud cases in which the money laundering statutes are being applied, see the February 28, 1995 U.S. Sentencing Commission staff memorandum from Win Swenson and Felicia Sarner to Phyllis Newton on a review of sentencing patterns in cases in which money laundering charges are added to fraud cases. In its review of FY 1994 cases, Swenson and Sarner found that money laundering charges raised offense levels from nine to 12 levels in 33 percent of the white collar cases!

The severity of the existing sanctions for money laundering charges creates the potential for real mischief because, as noted earlier, existing caselaw indicates that §§1956 and 1957 can be applied to virtually any fraud case. We believe that your current study will demonstrate that there is a widely disparate use of money laundering counts in fraud cases among and even within U.S. Attorneys' Offices, and that discretionary decisions on their use are being made in an undisciplined, ad hoc, and largely unmonitored fashion.

Recommendation to Revise Money Laundering Blue Sheet

Under the Department's 1993 "Blue Sheet" on Money Laundering Prosecutions and Forfeitures, review by the Money Laundering Section of decisions to charge §§1956 or 1957 offenses is limited to four narrowly-confined areas: prosecutions based on extraterritorial jurisdiction; charges linked to evasion of taxes; prosecution of attorneys; and prosecution of a financial institution. In all other situations, indictments need only to be sent to the Money Laundering Section for "informational purposes."

In all likelihood, the Criminal Division will learn in its study that individual prosecutors are making charging decisions that are even inconsistent with the general and cautious guidelines that were provided in its February 1992 Money Laundering Federal Prosecution Manual. As an illustration, in referring to possible "promotion" cases under §1956(a)(1)(A)(i), the Manual raised concerns about the making of bad law by applying the term too expansively:

It is easy to see, however, how such a theory could be taken too far. The mere deposit of funds received as proceeds of an on-going fraud scheme for example might literally meet the statutory requirements of §1956(a)(1)(A)(i), if it could be shown that the deposit was helpful to the defendant in keeping the scheme going, but it might also be viewed as the

Mr. Robert S. Litt
March 15, 1996
Page 4

conclusion of the fraud offense and not a separate violation of the money laundering statute. In other words, at some point the act generating the proceeds being laundered, the laundering offense, and the offense being promoted could all merge into a single transaction. Despite the favorable precedent cited above and to avoid the development of adverse case law, prosecutors are advised whenever possible to make clear that the defendant conducted the financial transaction with the intent to promote a new offense, or a new phase of a continuing offense, and not merely to complete or to conclude the specified unlawful activity that generated the property in the transaction. Manual at p. 257.

The Department currently requires Criminal Division review prior to the filing of RICO charges. The same rationale for such review applies with equal or even greater force to the use of money laundering charges for fraud offenses unrelated to major drug trafficking activities. Criminal Division review of RICO cases has been justified on the following grounds:

Since RICO encompasses a wide variety of state and federal offenses which can serve as predicate acts of racketeering, the statute can be used very broadly in a number of different circumstances. While this broad scope provides the government with an effective and versatile tool for dealing with a wide variety of criminal activity, it also provides the potential for abuse and overuse. Injudicious use of the statute would reduce its impact in cases where it is truly warranted. For this reason, it is the policy of the Criminal Division that RICO be selectively and uniformly used.

Organized Crime and Racketeering Section, Criminal Division, Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutions (September 1990) at pp. 138-39.

In order to avoid unwarranted disparity among and within U.S. Attorneys' Offices and the overuse of severe sentencing guidelines provisions in inappropriate cases, the Criminal Division should formulate guidelines for the utilization of money laundering statutes in fraud cases.

Mr. Robert S. Litt
March 15, 1996
Page 5

Recommendation on Money Laundering Sentencing Guidelines

In the same vein, we urge the Department to revisit its opposition to the amendments to the money laundering guidelines proposed last year by the Sentencing Commission, or, at the least, to modify its own position on such guidelines. During its review of all fraud cases in which money laundering statutes are used, we are convinced that the Department will find that there is no basis for going beyond the Commission's proposed underlying fraud offense levels in a high percentage of these cases.

It may well be that the much higher money laundering base levels may be appropriate in some fraud cases, even more than the higher base level suggested by the Department -- such as when an ongoing fraud is being perpetrated by a criminal organization and a part of the ongoing scheme is to conceal funds derived therefrom (e.g., diverting funds derived from a massive Ponzi scheme to off-shore unnumbered accounts) or to use funds to promote ongoing major fraud activity (e.g., investing substantial funds in marketing an ongoing Ponzi scheme). If the Department is concerned that the Sentencing Commission's proposal failed to address such activities, they can be dealt with more appropriately by supporting the Sentencing Commission's basic approach of relying on underlying fraud offense base levels in a majority of cases and then adding points for specific offense characteristics for the types of activities just described in the same way as points are now being added for money laundering offenses related to drug activity.

There may be other ways as well to avoid the irrational results now being reached. The guidelines could be amended, for example, to permit reductions in base levels in situations where the money laundering charges merge with or are not easily distinguishable from the underlying fraud offenses or where the use of the higher level money laundering base levels would otherwise create inequitable results.

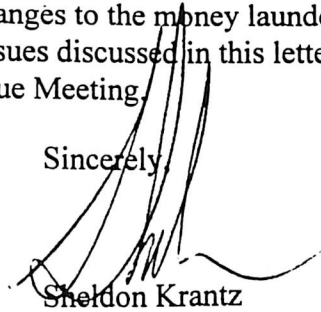
Conclusion

In summary, we believe that the lack of current departmental guidelines on and centralized review of money laundering charges in fraud cases are creating serious disparity problems and pernicious results. This is exacerbated by the unduly harsh money laundering sentencing guidelines and by the Department's current position with reference to these guidelines. The Department will be able to confirm the problems we

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March 15, 1996
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have identified when it completes its own study of the use by federal prosecutors of the money laundering statutes. At that point, we urge the Department to formulate uniform guidelines on and Criminal Division review of charging decisions in this area and to revise its current position on proposed changes to the money laundering sentencing guidelines. We further request that the issues discussed in this letter serve as the basis for further discussion at an upcoming Dialogue Meeting.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sheldon Krantz', written over the word 'Sincerely'.

Sheldon Krantz

SK/lmh

cc: David Margolis
Merrick Garland
Mary Harkenrider
Members of ABA and NACDL Dialogue Committee

17

United States v. Tino

[Cite as United States v. Freshour, 64 F.3d 664 (6th Cir. 1995)]
(Table Case) (Cert. Denied 1996)

Defendant Phillip Tino owned and operated a medical equipment business in Greenville, Tennessee, called Life Care Medical Sales and Rental (hereinafter "Life Care"). The business was founded in April 1985 and entered into a contract with the state of Tennessee, Department of Health and Environment, Medicaid Division, to be a Medicaid provider. The business was small and at no time had more than six employees. Mr. Tino was responsible for the overall management of the business. His wife, Mrs. Tino's role included ordering supplies and equipment, corresponding with Medicaid, paying bills, and dealing with customers. One of the employees, defendant Freshour, had the duty of obtaining prior authorizations from physicians and receiving orders for patients and placing orders for supplies and equipment.

In order for Life Care to provide a Medicaid recipient with supplies or equipment, Life Care had to receive prior authorization from Medicaid. An authorization form, which either had to be signed by a physician or have a prescription attached to it, had to be submitted to Medicaid listing the supplies or equipment needed for a particular patient. The requested supplies would then be approved by Medicaid and the forms would be returned to Life Care. After the authorization form was returned, Life Care was supposed to deliver the authorized equipment or supplies to the patient and submit a claim to Medicaid. Medicaid would then mail a weekly payment check along with remittance advices stating which claims were being paid by the check.

In early 1991, two Medicaid nurse-auditors began an audit of Life Care in response to complaints from a foster parent. At this time Life Care had 240 Medicaid patients and the audit took a random sample of approximately 23% to review. The auditors found many items which alerted her to indications of Medicaid fraud. She found delivery tickets that were missing, dates that had been altered, items which had arbitrarily been added to delivery tickets, and claims which had been submitted to Medicaid before the equipment had been delivered to the patient. They also found shortages between what was reportedly delivered and what was claimed by comparing the prior authorizations, the delivery tickets, and the claim forms. The audit also revealed that Life Care had improperly billed supplies and equipment under the wrong procedure codes in order to maximize reimbursement, and that Life Care sought reimbursement for quantities greater than what was actually delivered.

After the audit, defendants Phillip Tino, Page Tino and Beryl Freshour, were charged in an 87-count indictment.¹ Counts 1 through 57 charged all three defendants with mail fraud. The remaining counts of the indictment charged only the Tinos. Counts 58 through 63 charged violations of § 1957 for money laundering based on the issuance of six checks (greater than \$10,000) written between November 1989 and October 1990 on the account of Life Care to pay suppliers and, in two instances, to make down payments on purchases of real estate. Counts 64 through 86 charged violations of § 1956 (promotion) based on the writing of checks of less than \$10,000 to pay for business-related expenses, such as utilities, rent, equipment and supplies. Count 87 of the indictment sought forfeiture of all property involved in the §§ 1956 and 1957 pursuant to 18 U.S.C. § 982 and 21 U.S.C. § 853.

Mr. Tino was found guilty of 37 mail fraud counts as well as all the §§ 1957 and 1956 counts. Mrs. Tino was found guilty of 12 mail fraud counts and all money laundering counts.² Mrs. Freshour was found guilty on two counts of mail fraud. Phillip Tino was sentenced to 66 months imprisonment. Page Tino was sentenced to 51 months imprisonment. Beryl Freshour was sentenced to three years probation. The jury returned a separate verdict forfeiting two real properties of the Tinos which were traceable to the § 1957 violations.

The core of the Tino defendants' defense to the fraud charges was that even if false claims were submitted, the false claims were the result of mistake or accident and not the result of intentional fraud. On appeal, the Sixth Circuit noted that it was the province of the jury to make the credibility determinations in this regard, and the jury did not believe the defendants' defense, finding it incredible that so many "alleged mistakes" could have been made unintentionally. The jury found incredible the Tino defendants' explanation as to why the "alleged mistakes" occurred. The intent to defraud was evidenced by the sheer volume and variety of fraudulent claims submitted,

¹ Prior to an indictment being sought by the government in this case, the prosecution offered the Tinos a "deal." If Mr. Tino would plead guilty to a single felony violation relating to defrauding Medicaid, the government would not seek to bring charges against his wife. A letter from the Tino defendants' counsel indicated to the district court that both the Tinos rejected any deal which would require them to give up their health care businesses.

² According to Page Tino's cert. petition, the 12 mail fraud counts involved approximately \$28,000 over a three and one-half year period.

undercutting the Tino defendants' contention that the false claims were the result of mistake or accident.

With respect to the money laundering charges, the Tinos argued that the United States failed to present sufficient evidence for the jury to conclude that they knew the checks involved in the alleged money laundering scheme were the "proceeds" of the mail fraud, rather than part of their legitimate business. The court found that this argument ignored the compelling circumstantial evidence of knowledge. In this case, the government did not argue defendants engaged in transactions involving the proceeds of a third party's unlawful activity; it argued instead that Mr. and Mrs. Tino were conducting transactions involving the proceeds of their own mail fraud scheme. The Sixth Circuit found that the Tinos' contention that they did not know whether a particular transaction involved the payments from false claims was undercut by evidence of the scope of the fraud. The circumstantial evidence was such that the jury could find, beyond a reasonable doubt, that the Tinos knew that every payment from Medicaid represented in whole, or in part, payment for false claims and, therefore, every check drawn on the account, in whole or part, involved the proceeds.

Mrs. Tino also contended that the evidence was insufficient to find that, by using the money from the false claims to pay the rent and utilities for Lifecare, she intended to promote the mail fraud scheme. The Sixth Circuit found that plowing the proceeds of the mail fraud back into the business permitted the Tinos to submit more false claims to Medicaid, the unlawful activity they intended to promote. The rent and utilities payments for Lifecare enabled the submission of more false claims to Medicaid by continuing the operation of the business.

Mrs. Tino further argued that the district court denied her due process in sentencing by characterizing her as a co-owner of the medical supply business, which is the subject of this case. The Sixth Circuit held that there was no factual error by the district court. Although there is no dispute that the provider identification number issued by Medicaid to Mr. Tino was for a sole proprietorship, the evidence and testimony at trial indicated that Mrs. Tino held herself out to be an owner and manager of the business. Most significantly in a letter from Mrs. Tino to Medicaid, she described herself as "the owner of Life Care Medical." Although Mrs. Tino was not technically listed as an owner of the sole proprietorship with Medicaid, the evidence indicates that she acted as such. Therefore, the district court's conclusion that Mrs. Tino's involvement was such warranting enhancement in regard to the money laundering offenses was not clearly erroneous.

United States v. Adams, 74 F.3d 1093 (11th Cir., February 12, 1996)

Defendants Warren and Goldean Adams owned and operated a property management business called Golco Management Company. In December 1990, they entered into an agreement with the RTC to manage the certain properties which had been taken over by the RTC. Golco was to handle the day-to-day operations and maintain two RTC bank accounts. Unfortunately, the Adamses used Golco to defraud the RTC.

On one occasion, Warren Adams withdrew the balance of a bank account at the Fortune Savings Bank, which contained funds fraudulently obtained from the RTC, purchased a cashier's check paid to the order of Golco and deposited it in the Great Western Bank. Fortune, however, would not honor the check and returned it to Adams who, undaunted, deposited it in another account at Fortune, wrote a new check, and deposited the new check in the Great Western account.

Warren and Goldean Adams were convicted of several offenses in connection with defrauding the RTC and of two money laundering offenses. The 1956(a)(1)(A)(i) violation was based on the repurchase of the cashier's check at Western. The § 1957 violation was based on the deposit of that check into the Great Western account. The defendants raised a number of issues on appeal, among them challenging the validity of the money laundering convictions. The Government cross-appealed the district court's refusal to sentence the Adamses based upon their money laundering convictions.

Promotion: With respect to § 1956, the defendants argued that the government did not prove an intent to promote because there was no evidence that the financial transactions promoted the misapplication of funds belonging to the RTC. The Government argued that the purchase of a cashier's check from Fortune and the deposit of this check into the Great Western account were both intended to promote the continued misapplication of RTC funds. Alternatively, the Government argued that even if the fraud did not continue, the court, like courts in other circuits, should hold that it is possible to promote prior unlawful activity.¹ The court declined to address whether promoting prior activity is sufficient because it found that the evidence sufficiently established that transactions promoted the ongoing fraud scheme.

Sentencing Guidelines: In a cross-appeal, the Government challenged the sentences given to the Adamses, arguing that the district court erred when it failed to calculate their sentences based on the base offense level for § 1956. The court, by applying the base offense level for the underlying fraud offense,

¹ See, for example, United States v. Paramo, 998 F.2d 1212, 1218 (3rd Cir.1993).

reduced that respective base offense levels by ten levels. The Eleventh Circuit held that the jury found the Adamses guilty of money laundering and therefore these convictions must be included in their sentences. The court stated that "The district court cannot chose to simply ignore the fact that the defendants were convicted of violating § 1956."

Alternatively, the district court stated that it would depart downward 10 levels, under 5K2.11, on the basis that the defendants' conduct "did not cause or threaten the harm or evil sought to be prevented by the law proscribing the money laundering offenses." The Eleventh Circuit noted that the First and Eighth Circuits have addressed cases with similar facts and found that money laundering conduct did not warrant a downward departure.² The Eleventh Circuit agreed with the First and Eighth Circuits that the money laundering engaged in by the Adamses was of the type considered by Congress and the Sentencing Commission, and therefore did not warrant a downward departure. Thus, the court remanded the case for resentencing.

² See United States v. Pierro, 32 F.3d 611, 620 (1st Cir. 1994), cert. denied, 115 S. Ct. 919 (1995); United States v. Morris, 18 F. 3d 562, 569 (8th Cir. 1994). In addition, the court noted that the Second, Fifth and Ninth Circuits have affirmed district courts that refused to depart downward because the money laundering at issue was considered to be "heartland" money laundering.



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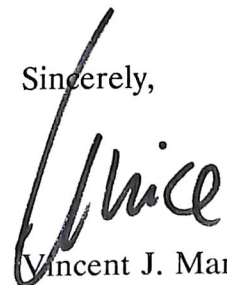
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Dear Merrick:

I wanted to take a moment to thank you for arranging to have Jamie speak to our committee at its recent meeting. I have always felt that it is important to maintain a balance in the committee between the defense and the government. Having Jamie as our speaker helped in a significant way to maintain that balance. I very much appreciate your help in bringing that about. Thanks also for being such a good friend to the committee over the past few years.

I hope that you and your family have a joyous holiday and a happy, healthy New Year.

Sincerely,



Vincent J. Marella

VJM/jp
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